

HONORABLE JOHN C. COUGHENOUR
HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES MOSELEY,

Plaintiff,

v.

STATE OF WASHINGTON; *et al.*,

Defendants.

NO. C20-1311-JCC-MLP

DEFENDANTS' RESPONSE TO
ORDER TO SHOW CAUSE WITH
SUBJOINED DECLARATION OF
COUNSEL

COME NOW the Defendants, by and through counsel, and offer the following response to the Court's Order to Show Cause. (Dkt. #7).

1. Discussions with Counsel regarding Removal and Waivers of Service

As reflected in the Court's files, Plaintiff filed this action in the Snohomish County Superior Court on July 24, 2020. (Dkt. #1-1). Counsel undersigned appeared in behalf of the Defendants on August 24, 2020. (Dkt. #6-4). Counsel undersigned thereafter filed a Notice of Removal on September 1, 2020. (Dkt. #1).

Counsel undersigned spoke with Plaintiff's counsel before removing this action to the U.S. District Court. Counsel undersigned wanted to advise Plaintiff's counsel of the intention to remove the case and inquired whether any of the individual defendants had yet been served. Plaintiff's counsel advised counsel undersigned that none of the individual defendant had yet been served. Counsel undersigned advised that individual defendants would consider waiver of service after the

1 case had been removed and specifically advised that an emailed request for waiver of service would
2 be deemed sufficient.

3 **2. Waivers of Service Requested after Order to Show Cause**

4 Counsel undersigned and Plaintiff's counsel have been involved in several cases together
5 of the years and have multiple cases now pending. Between the time of removal and the Court's
6 issuing its Order to Show Cause, Plaintiff's counsel did not request waiver of service from the
7 individual defendants. Further, Plaintiff did not provide notice of any intent to file a motion for
8 default, Fed. R. Civ. P. 55 and LCR 55, or file such a motion before the Court issued its Order to
9 Show Cause *sua sponte*.

10 On Friday, January 22, 2021, two days after the Court issued its Order to Show Cause,
11 counsel undersigned and Plaintiff's counsel exchanged emails regarding the Court's Order and the
12 status of the individual defendants. That same day, Plaintiff's counsel emailed counsel undersigned
13 requesting the individual defendants waive service of process under the federal rules as simplified
14 by their agreement. On Monday, January 25, 2021, counsel undersigned forwarded completed
15 Waivers of the Service of Summons by nine of the twelve individual defendants to Plaintiff's
16 counsel via email. Under the federal rules, the remaining three individual defendants still have more
17 than three weeks before they must respond to Plaintiff's counsel's request for waiver of service.

18 **3. Defendant Department of Corrections' Answer**

19 Counsel undersigned has been practicing civil litigation for nearly 25 years. It has not been
20 his practice to file multiple answers when representing multiple defendants. In this specific case,
21 counsel undersigned anticipated filing a single Answer to Plaintiff's Complaint once the individual
22 defendants were properly before the Court. That had not happened as of the time the Court issued
23 its Order to Show Cause. Moreover, had Plaintiff's counsel requested the Washington Department
24 of Corrections file an Answer, counsel undersigned would have done so. Plaintiff's counsel did not
25 do so.
26

Pursuant to Fed. R. Civ. P. 4(d)(3), the individual defendants who waive service have sixty days after the request to waive service was made—January 22, 2021—to Answer. Nevertheless, in light of the Court’s Order to Show Cause, counsel undersigned will file an Answer on behalf of Defendant Washington Department of Corrections prior to February 2, 2021, the deadline imposed by the Court’s Order to show cause why default should not be entered.

CONCLUSION

For the reasons set forth herein, including the lack of service or request for waiver of service by the individual defendants prior to the Order to Show Case, and the intention of counsel undersigned to file a single Answer once all defendants had been served or waived service, the Defendants submit they have shown cause why they have not answered and shown cause why the Court should not, *sua sponte*, enter default against the defendants.

SIGNED THIS 26th day of January, 2021.

ROBERT W. FERGUSON
Attorney General

s/ Scott M. Barbara
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Attorneys for Defendants

DECLARATION OF COUNSEL

SCOTT M. BARBARA hereby declares as follows:

1. I am over the age of 18 years and competent to act as a witness herein. Unless otherwise specified, the matters set forth herein are within my personal knowledge. I am counsel of record for the Defendants in this action.

2. I have been a licensed attorney in Washington State since 1991. After completing an active duty tour as a member of the US Air Force Judge Advocate General's Corps from 1991-1996, I began practicing civil litigation in the Seattle area. I have been admitted to practice before the United States District Court for the Western District of Washington since 1996, and I have been admitted to practice in the Court of Appeals for the Ninth Circuit since 1997. I have been employed by the Washington Attorney General's Office since August 2016, and I have been the Seattle Section Chief for the Torts Division since July 2019.

3. The factual matters set forth above in the Response to the Order to Show Cause are all true and correct to the best of my knowledge, recollection, and belief.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, belief, and recollection.

SIGNED THIS 26th day of January, 2021, at Federal Way, Washington.

s/ Scott M. Barbara
SCOTT M. BARBARA, WSBA No. 20885
Attorney for Defendants

DECLARATION OF SERVICE

I hereby declare that on this 26th day of January, 2021, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

Darryl Parker
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I declare under penalty of perjury that the foregoing is true and correct.

s/ Scott M. Barbara
SCOTT M. BARBARA, WSBA No. 20885
Email: scott.barbara@atg.wa.gov
Attorney for Defendants